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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Implementation of the	)	
Local Competition Provisions of the	)	CC Docket No. 96-98
Telecommunications Act of 1996	)	
	)	

COMMENTS OF CABLE & WIRELESS USA, INC.

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SUMMARY

Cable & Wireless USA is a major provider of both voice and data services throughout the United States. C&W USA serves tens of thousands of retail long distance customers, as well as dozens of resale carriers who buy underlying network services from C&W USA. In addition, the Company provides Internet services to thousands of retail customers and numerous wholesale Internet service providers. As the evolution of the U.S. telecommunications marketplace continues to move rapidly toward convergence, or "one stop shopping," C&W USA and the many other carriers like it must have access to local market entry if they are to continue to thrive and to spur competition and innovation. This proceeding is a critical part of ensuring open entry to local telecommunications markets for all competitors.

Reliance on unbundled network elements is the only practical means by which carriers like C&W USA can achieve early and effective market entry. Resale of existing retail services is not a viable option, for both economic and technical reasons, and construction of local facilities on a nationwide basis is infeasible due to the expense involved and the timeframe within which these carriers must act if they are to keep pace with the marketplace. Thus, the lease of wholesale facilities from existing facilities-based local carriers is the only viable option for many carriers. For many types of facilities and many locations, the only available supplier is the ILEC.

The "Necessary" and "Impair" Standards

The Supreme Court's decision in *AT&T v. Iowa Utilities Board* did not invalidate the list of UNEs previously established by the Commission. Rather, the Court merely stated that the FCC's decision-making process did not fully consider the implications of the "necessary" and "impair" standards of Section 251(d)(2). In particular, the Court was concerned that the

impairment standard was so all-encompassing as to permit even trivial differences to meet the test. C&W USA believes that this issue is easily remedied by the addition of a materiality element to the impairment test. Thus, a carrier would be impaired by an inability to obtain a UNE if its costs were *materially* increased or its service were *materially* delayed or limited in some way. This change satisfies the Supreme Court's concern and preserves the rules previously enacted by the Commission.

C&W USA believes that this standard should be applied to create a minimum set of uniform national standards for UNEs. The telecommunications marketplace is rapidly converging and carriers must raise capital, plan facilities purchase and construction, and design service offerings on a national basis. If a standard set of UNEs is not available throughout the nation, the risks and expenses associated with these variances will significantly decrease the development of competition in telecommunications markets. Certainty and uniformity go hand-in-hand with efficient planning and design and greatly facilitate the raising of capital.

In determining the appropriate set of minimum national UNEs, C&W USA believes that the FCC should view the process from the perspective of a new entrant into the local markets. The Act requires that UNEs be provided to "any requesting carrier," and that standard is best met by considering the minimum set of UNEs that a new entrant might need. This approach also is consistent with the Act's paramount goal of promoting new entry into local telecommunications services.

Minimum UNEs To Be Prescribed

Application of the impairment standard described above, including the standard of materiality, would lead to a conclusion that the original UNEs prescribed by the Commission should be retained. Each of these elements is required by new entrants if they are not to be

materially disadvantaged in their entry into local services. In addition, C&W USA submits that this list should be clarified to ensure that both voice and *data* services may be provided by new entrants.

The rapidly emerging marketplace will require all carriers to provide both voice and data services if they are to compete successfully. Thus, the Commission should include local loops on its list of minimum national UNEs, and should clarify that such "loops" include high capacity loops and dark fiber loops. Similarly, the FCC should include integrated digital loop carriers and digital subscriber line access multiplexers, and should clarify that the switching element includes packet switching as well as circuit switching among the UNE list. Finally, it is critical that the Commission recognize and use its authority to require incumbents to provide nondiscriminatory access to combinations of network elements. Competitive use of UNE combinations is crucial to the expeditious development of genuinely competitive, local voice and data markets.

Removal of UNEs

The Commission should preserve for itself the role of determining when prescribed UNEs may be phased out. To cede such power to the states would be to undermine the authority over creation of the list of minimum national UNEs which the Congress placed in the FCC. At the same time, however, the states can serve a valuable function in this process by conducting Section 271-like proceedings when a proposal to phase-out a UNE is made. The state can conduct a proceeding and make a recommendation to the FCC, which may then use that state recommendation in reaching its own determination as to whether a proposed phase-out is justified.

Any standard adopted in connection with the termination of particular UNEs in specific

locations should include a reasonable transition time for those companies then relying on that UNE to provide their services. Similarly, where contracts include agreements to provide certain UNEs, those contracts should remain enforceable for their term even when a UNE being provided thereunder is removed from the list of required elements. These provisions are necessary to protect carriers relying on UNEs from the threat of an abrupt end to their underlying service arrangement following a Commission decision to phase-out a UNE in a location.

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COMMENTS OF CABLE & WIRELESS USA, INC.

Cable & Wireless USA, Inc. ("C&W USA"), by its attorneys, respectfully submits the following comments on the definition of unbundled network elements ("UNEs") pursuant to Section 251(c) of the 1996 Act.[1]

C&W USA is a major provider of wholesale and retail Internet services, operating one of the largest Internet backbones in the world. C&W USA also is one of the largest long distance carriers in the United States, offering a full range of domestic and international voice, data, and messaging services. As a preeminent Internet services and long distance provider with ongoing plans to integrate and upgrade its networks, C&W USA is intensely interested in the outcome of this proceeding.

INTRODUCTION

C&W USA agrees with Chairman Kennard's statement that the Supreme Court's decision in *AT&T v. Iowa Utilities Board*[2] was a "monumental victory" for the Commission,

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1 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Second Further Notice of Proposed Rulemaking, FCC 99-70 (rel. April 16, 1999) ("*Second FNPRM*").

2 *AT&T Corp., et al., v. Iowa Utils. Bd., et al.*, 119 S. Ct. 721 (1999) ("*Iowa Utils. Bd.*").

and, ultimately, for consumers of local telephone services throughout the United States.[3] *Iowa Utilities Board* confirmed that the 1996 Act gives the FCC the primary role in ensuring that competition in local markets develops in a rapid and procompetitive manner,[4] and, more specifically, that the Commission has underlying jurisdiction to implement the provisions of Section 251, including authority over such critical issues as the pricing of UNEs.[5] In addition, *Iowa Utilities Board* upheld rules designed to make all three methods of local entry (not just facilities-based provision of service) available, including: (1) the "all elements" rule allowing requesting carriers to create services entirely with ILEC UNEs[6]; (2) the rule prohibiting ILECs from separating combinations of elements[7]; and (3) rules identifying specific ILEC features and functionalities as network elements that must be unbundled.[8]

The Commission's task in this remand is to reexamine its standards for defining UNEs, "taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements."[9] Notably, as the *Second FNPRM* recognizes, although the Court vacated rule 319, it did not express any criticism of the specific UNEs defined. Rather, because the Court did not perceive, based on the "necessary" and "impair" standards adopted by the FCC,

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3 Statement of FCC Chairman William E. Kennard on Today's Supreme Court Ruling on AT&T Corp. et al. v. Iowa Utilities Board et al., Nos. 97-826 et al., Jan. 25, 1999, <http://www.fcc.gov/speeches/kennard/statements/stwek906.html>.

4 *Iowa Utils. Board*, 119 S. Ct. at 730 ("We think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the provisions of [the Communications] Act, which include §§ 251 and 252, added by the Telecommunications Act of 1996") (internal quotations omitted).

5 *See id.* at 729-33.

6 *See id.* at 736.

7 *See id.* at 736-38.

8 *See id.* at 734.

9 *Id.* at 736.

that *any* element would not be subject to the unbundling requirement, it required the FCC to reconsider these standards in order to ensure that the UNEs listed furthered Congressional goals. Significantly, nothing in the *Iowa Utilities Board* decision requires the FCC to reach any specific outcome with regard to the UNEs previously defined, and nothing precludes the agency from mandating the provision of those UNEs it concludes will promote the Act's goal of robust local competition.

In these Comments, C&W USA urges the Commission to lower barriers to local entry and to encourage the provision of integrated telecommunications service packages by adopting a uniform, national list of minimum UNEs to be unbundled throughout the United States. The central question for the Commission in determining whether to mandate the availability of a UNE should be whether the UNE will promote the rapid development of competition by a multitude of providers -- that is, whether the availability of the UNE is "rationally related to the goals of the Act."[10] Thus, the agency's "necessary" and "impair" standards should be defined in light of principles that will further these goals.

Specifically, C&W USA urges the Commission to conclude that a requesting carrier would be "impaired" by a denial of access to a UNE if use of an externally supplied element, as compared to use of the ILEC's element, exhibits a *material* difference in either cost, time to provision of service, or the number or scope of customers to whom the service would be provided. Similarly, the "necessary" standard, which would apply only in certain limited circumstances, is satisfied if the carrier would experience a *material* loss in functionality as a result of the absence of the proprietary element and if the requesting carrier would be impaired

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10 *Iowa Utils. Bd.*, 119 S. Ct. at 734.

(as discussed above) by a lack of access. Unless and until a functioning competitive market for the supply of wholesale network elements develops, neither the "necessary" nor "impair" standard will be met with respect to the features and functionalities integrated into the ILEC network. The mere presence of a single or small number of other providers that are geographically limited or do not provide wholesale services is not sufficient to permit an end to the ILECs' obligation to provide UNEs.

C&W USA submits that application of these standards compels the availability not only of the elements previously identified by the Commission, but also of elements useful for the provision of DSL and other advanced broadband services. It is both inaccurate and unhelpful, however, to divide UNEs into those originally adopted and "additional" UNEs, because it implies that the "additional" UNEs somehow are optional or duplicative. Instead, in analyzing these UNEs, the Commission should organize its approach around the relationship between the various pieces of a comprehensive telecommunications network. Its rules should ensure the availability of those elements most central to a network and on which all other network functionalities depend, such as connectivity (in whatever variety, data or voice) to the customer premises. These elements are at the core of the network "rings" and are the most difficult to replace with external elements. It is only at the outermost "ring" -- add-on or optional functionalities -- that the impairment analysis becomes a closer issue. Theoretically, these elements will, ultimately, be the easiest to replace; today, however, they remain as irreplaceable as the core elements.

Finally, C&W USA is hopeful that, over time, the availability of wholesale alternatives will develop, and that some network elements no longer will need to be unbundled. In order to plan for such an eventuality, the Commission should develop reasonable procedures for

removing UNEs from the mandatory list. Although C&W USA agrees that states can play an important advisory role in this process, consistent with the primacy of the FCC's role under the Communications Act the agency itself must make the ultimate decision. To this end, C&W USA recommends that the Commission establish a proceeding on the model of a Section 271 hearing, which includes a formal role for the state commissions to consider removal of UNEs, either on an individual state basis or nationally. Further, C&W USA urges the Commission to adopt reasonable transition rules for any "soon to be retired UNEs" so as not to overturn reliance interests of carrier competitors or disrupt customers served using UNE arrangements.

I. THE COMMISSION SHOULD DEFINE THE "NECESSARY" AND "IMPAIR" STANDARDS CONSISTENT WITH THE ACT'S PURPOSE OF PROMOTING ALL METHODS OF COMPETITIVE ENTRY.

Section 251(d)(2) provides:

> In determining what network elements should be made available for the purposes of subsection (c)(3), the Commission shall consider at a minimum, whether –
>
> (A) access to such network elements as are proprietary in nature is *necessary*; and
>
> (B) the failure to provide access to such network elements would *impair* the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.[11]

The Supreme Court has made clear that these standards must be interpreted so as to further the objectives of the Act. Thus, although the terms "necessary" and "impair" embody some limiting concept, those limitations must be related to the Act's overall purpose of promoting competitive entry and removing barriers to market entry. The Commission must be

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[11] 47 U.S.C. § 251(d)(2) (emphasis added).

cognizant of the intended role of Section 251(c) in lowering entry barriers and enabling carriers, as contemplated by the "all elements rule," to provide competing services with minimal, if any, additional initial investment. This preeminent goal of the 1996 Act will be realized only if the Commission ensures access to the critical network elements not currently available as viable options for competitive carriers. C&W USA endorses the UNE rules proposed by CompTel, appended hereto as Attachment A, as reasonable rules intended to promote all methods of competitive entry.

A. UNEs Must Be Available Unless And Until Wholesale Alternatives Are Prevalent.

As the FCC notes in the *Second FNPRM*, the ILEC network is unique because it enjoys economies of density, connectivity, and scale.[12] These advantages are monumental, and, at the present time, they are also insurmountable. Indeed, it is only when the market has developed in such a way as to erode all three of these advantages that access to UNEs is neither likely nor necessary to further the goals embodied in Section 251(c). C&W USA submits that this never will happen unless and until a requesting carrier has multiple wholesale alternatives to the ILEC network.

Sections 251 and 252, in fact, reflect a Congressional effort to catalyze competition by requiring the existing monopoly providers to act as wholesale providers, through the provision of UNEs and of retail services at wholesale rates for resale. When a functioning wholesale market exists, it inevitably will "replace" this statutorily mandated role of the incumbents. Until then, the Act, in effect, requires ILECs to share their economies of density, connectivity, and scale so

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12 *Second FNPRM*, ¶ 27 (quoting *Local Competition First Report and Order*, ¶ 11).

that other carriers can enter the local market. Without a viable, wholesale market, no carrier could begin to compete with the incumbents' monopoly position.

In a fully competitive market, the Act contemplates that carriers seeking to provide service should have at least three effective entry strategies from which to choose: facilities-based deployment, wholesale entry, and service resale. Each entry strategy has different strengths and weaknesses, and therefore each is used for different purposes by different types of carriers, depending on the carrier's goals, the geographic market in which the carrier is operating, and the services the carrier offers.

For providers such as C&W USA, which owns some facilities throughout the United States, wholesale entry is an essential means of enhancing service offerings in existing markets and expanding into new geographic areas. Unlike expansion through facilities-based deployment, which is capital intensive at best, wholesale entry requires a much less substantial initial monetary investment. By enabling new entrants to purchase underlying facilities or capacity from existing providers and use that capacity to provide their own services, wholesale entry removes barriers to the provision of service, and allows carriers to gradually, and therefore efficiently, increase their customer base and traffic volumes over time. While wholesale entry can be used by new entrants -- those new to the industry entirely, those new to a particular geographic market, or those (relatively) new to a particular service market, like C&W USA -- it also is an effective and efficient technique for value-added providers who offer new or more effective ways of using existing infrastructure or technology. Such providers typically have an innovative product or technology which, when used with existing capabilities, produces greater benefits for customers. Value-added providers have no need to duplicate existing infrastructure, often cannot afford to, and, further, often are less skilled at doing so than are the incumbents.

Importantly, even as the level of competition increases in an area, wholesale entry remains an option, and in fact, becomes even more prevalent as additional facilities-based providers offer wholesale services.

The central goal of the 1996 Act is to make these three options -- facilities-based, wholesale, and resale service provision -- available to competitive providers of local telecommunications services.[13] Significantly, the Act "neither implicitly nor explicitly expresses a preference for one particular entry strategy."[14] Instead, the goal is to eliminate *all* barriers to entry, whether financial or technological, in order to maximize the potential competitive benefits to consumers. In short, the principal goal of the Act -- and therefore, the Commission's primary obligation in implementing the Act -- "is to ensure that *all* pro-competitive entry strategies may be explored."[15]

The Act compels incumbents to operate as wholesale providers *because they are the only carriers currently in a position to do so.* As noted, the ILEC networks enjoy economies of density, connectivity, and scale that cannot be duplicated by competitors, now or in the foreseeable future.[16] It is beyond dispute that incumbent LECs are "one of the last monopoly bottleneck strongholds in telecommunications."[17] In order for wholesale entry to be available, therefore, the incumbents must be compelled to provide unbundled network elements to

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13 *See* S. Conf. Rep. No. 104-230, 104th Cong. 1 (1996) (explaining that the 1996 Act erects a "procompetitive deregulatory national framework designed to accelerate rapid private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition").

14 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 12 (1996) ("*Local Competition First Report and Order*").

15 *Local Competition First Report and Order*, ¶ 12.

16 *See Second FNPRM*, ¶ 27 (citing *Local Competition First Report and Order*, ¶ 11).

17 *Local Competition First Report and Order*, ¶ 4.

competitors.

The wholesale obligations of Section 251(c)(3) will remain essential to the creation and maintenance of local competition until a competitive wholesale market develops. In other words, as long as an ILEC's network continues to enjoy economies of density, connectivity, and scale -- that is, as long as the incumbents are able to exploit and enjoy the benefits of monopolism -- the ILEC will have the incentive and the ability to prevent entry or impede competing carriers from using its local exchange network efficiently. ILECs effectively have a captive market: competitors cannot move large volumes of traffic to other networks, because such effective wholesale alternatives do not exist.

The only way to alter this behavior, or potential behavior, is to change the market structure within which the incumbent operates, thereby modifying the incumbent's incentives. Only if incumbents have the appropriate incentives to act in a procompetitive manner will competitive local markets be created. This cannot happen for wholesale network elements, however, until competing wholesale alternatives exist. Accordingly, the Commission's standard for determining when an unbundling obligation for a particular element should be eliminated is when there is an actual functioning wholesale market for that element.

Before a competitive wholesale market can evolve, there must be at least two fundamental developments. First, external elements -- those not provided by the ILEC -- must be capable of being used interchangeably and seamlessly with the incumbent's UNE in the provision of services to the end user. That is, if combining ILEC and non-ILEC functionalities into a single service offering would corrupt the service -- such as, for example, causing higher costs, lower quality, or service delays -- then the wholesale market is not fully competitive. Second, there must be evidence of wholesale competition. Specifically, there must be

demonstrable proof that multiple wholesale providers are holding themselves out to carriers as wholesale providers, and, further, that sufficient excess capacity exists in their networks to replace the ILECs' provisioning of wholesale elements.

After wholesale alternatives develop, C&W USA expects that the dynamics of competition will change dramatically. For example, the long distance market has witnessed the creation of a vibrant wholesale marketplace as a result of the establishment of both nationwide and regional backbone networks. The Commission has credited that wholesale market as being "*a major reason* for the increased competition in the long distance services market."[18] Similarly, in the context of the market for local services, the Commission cannot begin to relax its regulations -- and particularly the unbundling obligations at issue in this proceeding -- until comparable wholesale competition develops. Unless and until those circumstances exist, the 1996 Act's goal of multiple entry techniques requires that the ILECs provide UNEs to competitors. It is in furtherance of this goal that the Supreme Court has directed the Commission to reexamine the "necessary" and "impair" standards; accordingly, the agency's application of these standards must be consistent with that goal.

B. "Impairment" Requires That There Be A Material Difference Derived From The Use Of ILEC UNEs As Compared To Externally Supplied Elements.

Before the Supreme Court's *Iowa Utilities Board* decision, the Commission determined that "'impair' means to become worse or diminish in value" and explained that "an entrant's ability to offer a telecommunications service is 'diminished in value' if the quality of the service

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18 *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, FCC 98-225, ¶ 42 (Sept. 14, 1998) (emphasis added).

the entrant can offer, absent access to the requested element, declines and/or the cost of providing the service rises."[19] In articulating this standard, the Commission declined to consider in the analysis the availability of an element from a source outside of the ILECs' networks.[20]

The Supreme Court expressed concern that the Commission's explanation of the applicable standard (1) disregarded the availability of outside elements; and (2) equated "impairment" with *any* increased cost or decrease in service quality that results from the failure of a carrier to obtain access to an element, no matter how trivial.[21] On remand, the Commission can address the Court's two concerns directly and without disrupting the procompetitive results sought in the *Local Competition First Report and Order*. With respect to the "impair" standard, C&W USA proposes the following definition:

> A carrier is impaired if a failure to obtain access to a network element would impose a *material* increase in cost, a *material* delay, or would *materially* restrict the number or scope of customer likely to receive the service any requesting carrier seeks to offer. Impairment would arise if, for example, any one of the following applied:
>
> (1) a denial would materially increase the cost to provision, combine, or otherwise utilize a requested network element in connection with other elements of the ILEC's network or the network of an alternative provider,
>
> (2) a denial would cause a requesting carrier to experience a material delay to provision, combine or otherwise utilize a network in connection with other elements of the ILEC's network or the network of an alternative provider, or
>
> (3) a network element exhibits material economies of scale and scope.

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19 *Local Competition First Report and Order*, ¶ 285 (quoting Random House College Dictionary).

20 *See Local Competition First Report and Order.*, ¶¶ 283, 286.

21 *See Iowa Utils. Bd.*, 119 S. Ct. at 736.

As discussed below, this rule satisfies both of the concerns raised by the Supreme Court.

1. The Proposed Rule Answers the Court's Concern that Trivial Differences Might Require an Element to be Unbundled.

In determining whether to require unbundled access to a non-proprietary network element under the impairment standard, the Commission must develop, pursuant to the Court's ruling, *some* limiting standard. That is, any increase in cost, or decrease in quality, however slight, resulting from denial of an element, must *not* automatically constitute impairment.[22] C&W USA's proposed definition incorporates a materiality test into the impairment standard that responds to the Court's concern that "trivial" differences in cost would render an ILEC element a UNE. By incorporating a materiality test in the impairment standard, the Commission can ensure that its limiting standard is qualitative, rather than meaningless or insignificant.

Although the materiality standard defies precise quantification, it requires that there be a substantial or identifiable difference between the alternatives such that a requesting carrier would make a rational decision to use the ILEC element instead of another alternative.[23] In the *Local Competition First Report and Order*, the Commission defined "impair" using an ordinary and natural meaning of the word, concluding that "[t]he term 'impair' means 'to make or cause to become worse; diminish in value.'"[24] Rather than discard this approach entirely, C&W USA proposes that the Commission should modify the approach in interpreting the term "impair."

Specifically, C&W USA encourages the Commission to invigor the degree of impairment

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22 *See Iowa Utils. Bd.*, 119 S. Ct. at 734.

23 Any "close calls" should result in the favor of the requesting carrier in order to promote the Act's goal of rapid development of competition.

24 *Local Competition First Report and Order*, ¶ 285, citing Random House College Dictionary 665 (rev. ed. 1984).

required under the standard. In other words, the Commission should continue to interpret "impair" to mean "diminished in value," but should *quantify* that diminishment as "material" as opposed to "trivial." As Justice Souter noted in his dissent, "impairment" is an ambiguous term, which can mean any degree of impact depending on its context.[25] The Commission's responsibility here is to match that degree of impact to the Act's procompetitive objectives. This is not difficult to accomplish. The Commission can respond to the Court's concern by maintaining its common sense definition of impairment, with the addition of a materiality standard.

The Commission reached a similar result when it interpreted the term "impair" in the context of the over-the-air reception provisions of the 1996 Act. There, the impairment concept was given a clear meaning in Section 1.4000 of the Commission's rules governing over-the-air devices ("Rule").[26] This Rule prohibits a restriction, including a homeowners' association rule, that "impairs the installation, maintenance, or use" of various types of antennae "to the extent it so impairs."[27] In this context, a regulation impairs if it: (1) unreasonably delays or prevents installation, maintenance, or use; (2) unreasonably increases the cost of installation, maintenance, or use; or (3) precludes reception of a signal of acceptable quality.[28]

This impairment standard is analogous to C&W USA's proposed interpretation of the UNE unbundling impairment standard at issue in this proceeding. Here, a carrier is considered impaired if a failure to obtain access to an element would result in a material increase in cost,

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25 *See Iowa Utils. Bd.*, 119 S. Ct. at 739 (Souter, J., dissenting).

26 47 C.F.R. § 1.4000.

27 47 C.F.R. § 1.4000(a)(1).

28 47 C.F.R. § 1.4000(2)(i)-(iii).

material delay in providing service, or material restriction in the number or scope of customers to be served. Similarly, impairment with respect to over-the-air reception devices involves delays, cost increases, or a decrease in quality. Like the concept of reasonableness in the context of over-the-air reception devices, the concept of materiality achieves the provision's objectives without reducing the standard to an absurdity.

2. The Impairment Standard Requires the Consideration of Whether Externally Supplied Elements Are Interchangeable With ILEC Elements.

The impairment standard also addresses the Court's concern that the test should examine alternatives available outside of the ILEC network. These alternative sources include the competitor itself (so-called self-provisioning), other competitors, or non-carrier service providers. For external elements, the Commission must consider how the element will work in connection with other elements provided by the ILEC and must consider material differences in cost, delay, and scope in interconnecting and using the external element with the ILEC network. Essentially, a carrier is impaired *unless* an externally supplied element is fully interchangeable with the ILEC element in all respects, including cost, ability to combine, and scope of deployment. In other words, if the outside alternative is fully "interchangeable" with the ILECs' elements, then -- and only then -- is a requesting carrier not impaired by denial of access to the element.

Notably, interchangeability depends principally on the type of element and the manner in which it operates within a telecommunications network. Interchangeability is not likely to vary greatly as a result of the differing technical qualities of a network from one region to another; instead, it is very much dependent on the way in which ILEC provisioning systems are designed, according to the principles of openness and interoperability. C&W USA would emphasize that

the interchangeability concept is entirely consistent with the procompetitive purposes of the 1996 Act. In order to encourage viable long-term competition, underlying networks must be based on open standards, which reduce barriers to entry and encourage innovation. This is evidenced by the current explosion in IP-based networks, which employ open platforms. Significantly, by adopting the interchangeability concept as a guiding principle, the Commission will be facilitating the deployment of open, rather than closed, networks.

In order to achieve interchangeability, the means by which elements are provisioned and connected to each other must eliminate all material differences in cost, time to provision, and functionality between an ILEC network element and a competitive alternative. With respect to cost, interchangeability requires that there be no material increase in development and deployment costs, or material decrease in economies of scale between an ILEC network element and a competitive alternative. Alternative network elements must be accessible without significant modification to the competitive carrier's network and must be priced in a way that does not materially exceed the incumbent's charges. If a carrier's ability to compete is materially diminished as a result of the cost structures associated with the use of alternative network elements, then the impair standard is met.

In addition, there must be no material difference in functionality between the ILEC element and the competitive alternative. If the elements truly are interchangeable, customers will be unable to distinguish between the service offerings that use an alternative network element and those that use an ILEC network element. If customers are able to differentiate based on a material decrease in functionality, then the impair standard is satisfied. Interchangeability also requires that the use of a competitive alternative not result in a material delay in the market introduction of a competitive service offering. That is, if a delay in provisioning adversely

affects the competing carrier's service deployment strategy or consumer acceptance of the service, the impair standard is met. In each of these cases the "impair" standard is satisfied and unbundling is required.

C. The "Necessary" Standard

Clearly, the necessary standard is closely related to impairment. In ordinary parlance, asking whether an element is necessary easily can be the converse of asking whether a carrier is harmed or impaired by not having the element. Although the necessary test is distinct, however, from the impairment test, and applies only to *proprietary* elements as discussed below, the two standards are linked in that the concept of materiality and the factors that determine impairment play a role under each standard. Where they differ is only in the type of impairment that need be shown.

C&W USA proposes the following "necessary" standard:

> Access to a network element that has a proprietary component is necessary if a material loss in the functionality of the network element would result without access to its proprietary characteristic and if the requesting carrier's ability to provide the intended service would otherwise be impaired in accordance with paragraph (b) below.

1. Definition of Elements which are "Proprietary in Nature"

Initially, it is important to note that the "necessary" standard is the exception, not the rule: Section 251(d)(2)(A) makes clear that it applies only to elements which are "proprietary in nature."[29] Indeed, the Commission has reached the conclusion that the necessary standard applies only to proprietary elements, and the Court's decision does not alter this conclusion in

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[29] 47 U.S.C. § 251(d)(2)(A).

any way.[30] Thus, for non-proprietary elements, the only standard that is relevant is the impairment standard.

In its *Local Competition First Report and Order*, the Commission defined elements which are "proprietary in nature" as those "with proprietary protocols" or "containing proprietary information."[31] Despite the Court's silence on the issue of the Commission's interpretation of the term "proprietary," the agency now seeks comment on the meaning of "proprietary."[32]

As a starting point, C&W USA urges the Commission to adopt a presumption that any functionality that is subject to accepted industry standards cannot be proprietary, regardless of how the ILEC chooses to provide the element. In that regard, C&W USA agrees that ILEC signaling protocols that adhere to Telcordia (formerly Bellcore) standards are not proprietary because they use industry-wide, as opposed to ILEC-specific, protocols.[33] Similarly, network elements should be considered non-proprietary if the interfaces, features, and capabilities sought by the requesting carrier are defined by recognized industry standard-setting entities, are established by Telcordia, or are otherwise available from other vendors.[34]

In the event that an element does not fall within this presumption, C&W USA submits that the "proprietary" standard should be construed narrowly and in such a way as not to create incentives for the ILECs to litigate classification or otherwise raise questionable claims of a proprietary nature. This Commission must guard against potential ILEC attempts to claim

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30 *See Second FNPRM,* ¶ 19; *see also Iowa Utils. Bd.*, 119 S. Ct. at 734-36; *Iowa Util. Bd.*, 120 F.3d at 811, n.31; *Local Competition First Report and Order*, ¶¶ 277-88.

31 *Local Competition First Report and Order*, ¶ 282.

32 *See Second FNPRM*, ¶ 15.

33 *See Local Competition First Report and Order*, ¶ 481.

34 *See Second FNPRM*, ¶15.

proprietary status simply as a delaying tactic or in order to escape their unbundling obligations. Unless the term is defined in such as way as to make it the exception, not the rule, litigation over whether elements are "proprietary in nature" will be inevitable and interminable.

Accordingly, C&W USA proposes that the Commission limit elements which are "proprietary in nature" to those that disclose customer-specific information other than that which a carrier would receive as a corollary to the carrier-customer relationship, or those that disclose a method or procedure protected by the ILECs' own intellectual property rights. Specifically, C&W USA proposes that elements which are "proprietary in nature" be defined as follows:

> A network element may be considered to be proprietary if the elements:
>
> (i) disclose customer-specific information other than that which a carrier would receive from the carrier-customer relationship; or
>
> (ii) disclose a method or procedure protected by the ILEC's own intellectual property rights.

It is important to note that simply receiving the benefit of a new process is not sufficient under part (ii) of the proposed definition to classify the element as proprietary. Under the statute, the purchaser of the UNE, though use of the element, actually must receive an unfair advantage as a direct result of the disclosure of the element's proprietary process or method. In other words, the necessary standard should apply only when proprietary aspects of an element *must be disclosed* when it is unbundled. If unbundling an element will reveal a proprietary methodology or process that can be protected by patent, copyright, or trade secrecy laws, only then should it be considered proprietary. Again, the difference here is between merely obtaining the benefit of a proprietary methodology and revealing the methodology itself. In the latter case, the element is proprietary and the application of the necessary standard is appropriate.

2. The Definition of "Necessary"

In the rare circumstances where an element is "proprietary in nature," C&W USA submits that "necessary" should be defined essentially as "impairment, plus." That is, necessary should be interpreted to mean that (1) the purchaser of the UNE will be impaired (the same impairment standard as discussed above) by a lack of access; *plus* (2) the UNE will experience a material loss in functionality without the element that is claimed to be proprietary.

C&W USA's proposed definition is consistent with the FCC's interpretation of the term "necessary" in other, related contexts. In the *Local Competition First Report and Order*, for example, the Commission examined the Section 251(c)(6) collocation equipment requirement and the meaning of the word necessary. In so doing, the Commission adopted an expansive reading of the term. The Commission concluded that ILECs are required to permit the collocation of equipment *used* for interconnection or access to UNEs.[35] This interpretation of necessary -- "used" or "useful" as opposed to "indispensable" -- is a broad interpretation that the Commission believed most likely would promote fair competition consistent with the purposes of the Act.[36] With respect to Section 251(c)(6), the Commission noted that a strict definition of necessary could allow ILECs to avoid collocating certain equipment, thus undermining the procompetitive purposes of the Act.

Congressional use of the same term in Section 251(d)(2) should be given the same interpretation. The Commission has interpreted "necessary" to mean a prerequisite to competition, such that without access to certain proprietary elements, the ability of competitors

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35 *Local Competition First Report and Order*, ¶ 579.

36 *See id.*

to compete would be significantly impaired or thwarted.[37] C&W USA believes that it is reasonable to interpret both "necessary" and "impair" using common-sense definitions and in a manner sufficiently broad to promote UNE competition as envisioned in the Act.

D. The Meaning Of Section 251(D)(2)'s Instruction To "Consider" These Factors

The Commission has sought comment on what weight the Commission should attach to the "necessary" and "impair" requirements of Section 251(d)(2).[38] The Commission also has sought comment on whether factors other than the "necessary" or "impair" standards should be considered in determining whether a particular network element should be unbundled, and, further, whether any of these factors should be given weight enough to require the unbundling of an element even if the "necessary" or "impair" standards are not met.[39] C&W USA submits that the "necessary" and "impair" standards are not exclusive and binding: the Commission has the discretionary authority to consider other factors -- such as the promotion of specific important statutory goals -- that may require the unbundling of a network element even if the "necessary" or "impair" standards are not satisfied. In addition, C&W USA would emphasize that the agency always must be guided by the Act's paramount goal: the development and furtherance of competition.

Section 251(d)(2) states that the Commission shall "consider, at a minimum," whether access is necessary or whether lack of access would impair a requesting carrier's ability to

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37 *See Local Competition First Report and Order*, ¶ 282.

38 *See Second FNPRM*, ¶ 29.

39 *See id.*, ¶ 30.

provide service.[40] As the Commission points out in the *Second FNPRM*, the requirement that the agency "consider" a particular factor means only that the Commission must "reach an express and considered conclusion" about that factor's importance;[41] the agency is not required to give that factor "any specific weight."[42] However, consistent with the Supreme Court's decision, the Commission also must ensure that its "consideration" gives sufficient "substance" to the "necessary" and "impair" requirements.[43] C&W USA suggests that the Court's concerns about the substance of the "necessary" and "impair" requirements would be addressed fully if satisfaction of the standard results in an absolute presumption that the network element will be made available on an unbundled basis.

However, while satisfaction of the standard should result in an absolute presumption that the UNE will be made available, *failure* to meet the "necessary" and "impair" requirements should not be considered equally dispositive. Section 251(d)(2) requires the Commission to consider, "at a minimum" -- or "at least" -- the "necessary" and "impair" standards: Section 251(d) "does not restrict the factors" that the Commission may consider.[44] Further, as noted above, the FCC is not required to give satisfaction (or not) of the "necessary" and "impair" standards any "specific weight," or, indeed, any weight at all.[45] Accordingly, it is clear that a determination that the unbundling of an element does not satisfy the "necessary" and "impair" standards need not necessarily end the analysis. Pursuant to Section 251(d)(2), the Commission

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40 47 U.S.C. § 251(d)(2)(A),(B).

41 *Second FNPRM*, ¶ 29.

42 *Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151, 175 (D.C. Cir. 1995).

43 *Second FNPRM*, ¶ 29; *Iowa Utils. Bd.*, 119 S. Ct. at 735.

44 *Central Vermont Ry., Inc. v. FCC*, 711 F.2d 331, 335 (D.C. Cir. 1983).

45 *Time Warner*, 56 F.3d at 175.

has the authority, after it has concluded its initial consideration and determined that a UNE does not meet the test, to expand its consideration to include other various factors.

Specifically, C&W USA respectfully submits that the Commission in its discretion may choose to require that a network element be made available on an unbundled basis in order to advance certain important goals of the 1996 Act other than the promotion of local competition through Section 251. For example, the FCC should, indeed, must be ready, if necessary, to use its discretionary to require the provision of UNEs in order to promote the development and deployment of advanced services. Or, it could become advisable for the Commission to require the provision of UNEs to further the 1996 Act's express mandate of ensuring the promotion of universal service. Importantly, C&W USA is not suggesting that the Commission's discretionary authority to require the provision of a UNE outside of the context of Section 251 is unlimited, or that it should be exercised lightly. However, in some instances, specific statutory mandates of the 1996 Act may only be furthered by the Commission's discretionary implementation of the Act's network element unbundling obligations; the Commission should be ready to do so.

E. Methodology For Applying The Standards

Evaluation of impairment on a central office-by-central office basis is equivalent to ceding competition behind the Iron Curtain of ILEC litigation and delay. The only guaranteed result of such a procedure is that the costs of entering local markets will skyrocket, and carriers will be materially delayed in entering the local market. In order to avoid such a severe impediment to the Act's goals of the rapid introduction of competition, C&W USA recommends that the Commission adopt a uniform, national list of UNEs that will be available everywhere. In addition, in order to promote widespread competition, the Commission should evaluate